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Supreme Court, U.S.
FILED

No. 941488 MAR - 7 1995

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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CHARLES T. SHERWIN,

PETITIONER

vs.

DEPARTMENT OF THE AIR FORCE,

RESPONDENT

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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48 pp

## QUESTIONS PRESENTED

(1) Whether it is appropriate for the District Court to grant summary judgment as a matter of law when there exists a genuine issue of a material fact found in an earlier ruling by the fact finder -- a ruling which was reconsidered and necessarily became "law of the case" when denied?

(2) Whether is appropriate for the Appellate Court to affirm an obvious error made by the District Court in short-shrive status, when the law requires a de novo review by the Appellate Court in all grants of summary judgment made as a "matter of law" by the District Court?

(3) Whether a de novo review by the appellate court as is required by law when grants of summary judgment are ruled as a matter of law by the District Court, can consist of a perfunctory, short-shrive, one-paragraph, per curiam opinion, affirming on the obviously flawed, erroneous reasoning of the District Court?

(4) Whether it is appropriate for an Appellant Court to disregard and rule contrary to all the other Circuit Courts of Appeal when it is clear that when genuine issues of material fact are found to exist in a case, it cannot be resolved by summary judgment, but would have to come-on for trial?

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Appendix C — Unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit No. 92-1678, dated October 11, 1994, affirming the erroneous action made by the District Court, granting of summary judgment and dismissing the action.

Appendix D — Petition for Rehearing and Suggestion for Rehearing In Banc (FRAP's 40 and 35), dated October 18, 1994, filed with the Fourth Circuit Court of Appeals.

Appendix E Order of the United States Court of Appeals for the Fourth Circuit denying Plaintiff-Appellant his Petition for Rehearing with Suggestion of Rehearing In Banc.

Appendix F Mandate stating the judgment of the Court dated October 11, 1994, takes effect November 15, 1994.

Appendix G Application for Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, to the Supreme Court of the United States, dated January 23, 1995.

Appendix H Order of the Supreme Court of the United States No. A-549, signed by William H. Rehnquist, Chief Justice of the United States, granting additional time to file, extended to and including March 8, 1995.

Appendix I Order of the U.S. District Court for the Eastern District of North Carolina, dated February 8, 1995, denying plaintiff's motion for relief from judgment made pursuant to Federal Rule of Civil Procedures 60(b)(6).

TABLE OF AUTHORITIES CITED CASES

Blau v. Delmonte Corp., 748 F.2d 1348 (C.A. 9 1984) cert denied 106 S.Ct. 183. . . 8

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CHARLES T. SHERWIN,

PETITIONER

vs.

DEPARTMENT OF THE AIR FORCE,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Petitioner, Charles T. Sherwin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit to affirm the order and judgment of the

United States District Court for the Eastern District of North Carolina docket number 92-1678, CA 90-34-CIV-3-BR, affirming the granting of summary judgment to the defendant.

## OPINIONS BELOW

The written opinion of the district court No. 90-34-CIV-3-BR appears in Appendix A to this Petition. The written opinion of the district court finding a "genuine issue of a material fact" on November 23, 1990, appears in Appendix B. The unpublished opinion of the Fourth Circuit Court of Appeals appears at Appendix C -- Docket No. 92-1678 which affirms the opinion in Appendix A. The Plaintiff - Appellant's Petition for Rehearing and Suggestion for Re Hearing In Banc appears at Appendix D. The denial by the U.S. Court of Appeals for the Fourth Circuit of the Petition for Re Hearing, Suggestion for Re Hearing In Banc, appears at Appendix E. The Mandate of the Fourth Circuit Court of Appeals affirming the judgment of the district court appears at Appendix F. Petitioner's Application for an

Extension of time to the Supreme Court appears at Appendix G. The Order signed by Chief Justice Rehnquist granting an extension of time appears at Appendix H. The post-judgment order of the district court denying plaintiff's motion for relief made pursuant to F.R.C.P. 60(b)(6) appears at Appendix I.

## JURISDICTION

The Fourth Circuit U.S. Court of Appeals' Opinion in this matter was decided on October 11, 1994. A timely Petition for Rehearing, Suggestion for Rehearing In Banc, was filed on October 18, 1994. The Fourth Circuit U.S. Court of Appeals' denial of appellant's Petition for Rehearing, Suggestion for Rehearing In Banc was filed on November 8, 1994. The Mandate of the U.S. Court of Appeals for the Fourth Circuit was filed on November 15, 1994. A timely application for an Extension of Time was filed with this Supreme Court on January 23, 1995. The Order Numbered A-549 signed by Chief Justice William H. Rehquist extending the time to and

including March 8, 1995, appears in Appendix H. This Court's jurisdiction is invoked under 28 U.S. Code Section 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

5 U.S. Code Section 552a; United States Constitutional Amendment No. 5; Federal Rule of Civil Procedure 56; Federal Rule of Civil Procedure 60; "Law of Case" Doctrine. "Line of Case" Doctrine.

## STATEMENT OF THE CASE

Petitioner filed a lawsuit in U.S. District Court for the Eastern District of North Carolina, on April 6, 1990, alleging, among other contentions, that the Air Force failed to comply with the Privacy Act, 5 U.S. Code Section 552a, by keeping, maintaining, and using secret files on the plaintiff disguised as personal notes and other unlawful unfavorable information files. On November 23, 1990, the U.S. District Court "found" that there existed a "genuine issue of a material fact" in this case, the

defendant asked the court to re-consider its "finding" of the "genuine issue of a material fact," and the U.S. District Court denied that motion, which at that point became "law of the case," in accordance with Federal Rule of Civil Procedure 56, and the defendant could not be granted relief by motion practice and through summary judgment. The defendant moved, again, for partial summary judgment over the same issues and facts and was again denied; the defendant moved, yet again, for summary judgment, and was finally granted the summary judgment motion, while there still exist(s) the "genuine issue of a material fact" from the earlier ruling made by the same judge, of November 23, 1990, which necessarily became "law of the case," and any granting of summary judgment would be precluded by the previous "finding" that was re-considered and denied, and had to become "law of the case." The matter was appealed to the U.S. Court of Appeals for the Fourth Circuit, and the Fourth Circuit Court of Appeals affirmed the granting of Summary Judgment and Dismissal by the U.S. District

Court, which is unlawful and erroneous, to say the least, if not a violation of petitioner's Constitutional guarantees of due-process of law entailing equal treatment, protection, and petitioner's substantive due-process rights before the courts.

## REASONS FOR GRANTING THE WRIT

Summary Judgment may not issue when material issues of fact requiring trial to resolve are present. See, D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d. 1144 (C.A. Fed. 1983). District Court cannot try issues of fact on motion for summary judgment, but is empowered to determine only whether there are issues to be tried. See, Gross v. Kenton Structural and Ornamental Iron Works, Inc., 581 F. Supp. 390 (D.C. Ohio 1984). Task of the Appeals Court is that of the trial court when reviewing grants of summary judgment, that is, it must determine de novo, whether viewing evidence in light most favorable to the non-moving party, (the) moving party has determined that there are no genuine issues, See, Continental Casualty Co. v. City of

Richmond, 763 F.2d. 1076 (C.A. 9 1985). Court of Appeals reviews grant of summary judgment de novo, resolving all reasonable doubts about the facts in favor of the non-moving party. See, S.E.C. v. Belmont Reid & Co., Inc., 794 F.2d 1388 (C.A. 9 1986); Tackitt v. Prudential Ins. Co. of America, 758 F.2d 1572, 758 F.2d 1572 (C.A. 11 1985); Freeman v. Hittle, 747 F.2d 1299 (C.A. Wash. 1984); The "line of cases" before the various Courts' of Appeal clearly show that (they) have the duty and responsibility to review all grants of summary judgment de novo, which cannot be accomplished by an affirmation of the district court's erroneous judgment that, itself, could not have been entered: there exists a "genuine issue of a material fact" found in a previous Order denying the defendent its Motion for Summary Judgment, which the defendant appealed pursuant to F.R.C.P. 60(b)(6) and was denied, and thus the "finding of the genuine issue of a material fact" by the district court became "law of the case," and the case had to proceed to trial to resolve the disputed "genuine issue of a material fact."

See, Blau v. Del Monte Corp., 748 F.2d 1348 (C.A. 9 1984) cert denied 106 S.Ct. 183. Clearly, the "line of cases" shows that the appellate court has erred in its affirming of the erroneous granting of summary judgment to the defendant by the district court, the same presiding judge who "found" the "genuine issue of material fact" in (his) earlier Order; the same presiding judge who denied the motion for re-consideration made by the defendant, which made the "finding" "law of the case". See, Erie Conduit Corp. v. Metropolitan Asphalt Paving Ass'n, 560 F.Supp. 305 (D.C.N.Y. 1983).

There is definate controversy in the Circuits as none of the other circuit courts of appeal allow the granting of summary judgment to either the moving or non-moving party when there is adjudged or it has been pre-determined that a "genuine issue of a material fact" exists in a case. The Fourth Circuit Court of Appeals has erred in its affirming of the district court's judgment granting of summary judgment to the moving party. Clearly, the role of the court of appeals in reviewing a grant of summary judgment

is to determine whether there is any genuine issue of material fact underlying adjudication, and if not, whether substantive law was correctly applied. See, Byers v. Burleson, 713 F.2d 856, U.S.App.D.C. 62 (1983) on remand 100 F.R.D. 436. Once a genuine issue of material fact is found to exist, summary judgment cannot be granted.

## CONCLUSION

Based on the foregoing and above analysis, the following are proper and reasonable conclusions:

The U.S. District Court for the Eastern District of North Carolina erred when it granted summary judgment and dismissal in favor of the defendant because there exists a "genuine issue of a material fact" that became "law of the case" because that "finding" was appealed by F.R.C.P. 60(b) motion for re-consideration and was denied by the same judge who "found" the "genuine issue of a material fact" in (his) previous Order -- a "ruling" that was not erroneous and had to become "law of the case."

The matter had to come-on for trial, and could not be resolved by summary judgment.

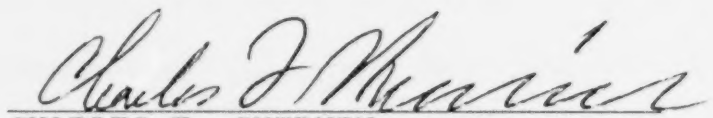
The Fourth Circuit Court of Appeals affirmed the above erroneous Judgment made by the district court, when the "line of case" doctrine requires a de novo review of all grants of summary judgment by the district court -- not a "short-shrift" one-paragraph ". . .affirm on the basis of the judgment of the district court," as was accomplished in this case. Clearly, the granting of any summary judgment by the district court entitles the aggrieved litigant to more than a one-paragraph affirmance of an obviously erroneous ruling made by the district court.

There is controversey within the circuits. Each-and-every circuit U.S. Court of Appeals' other than the 4th Circuit has ruled that summary judgment cannot be upheld if there exists a "genuine issue of a material fact," and that if there exists a genuine issue of material fact, it cannot be resolved by summary rulings. It can only be resolved by trial.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals and the District Court in this matter.

DATED: March 6, 1995

Respectfully submitted,



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 90-34-CIV-3-BR

| | | |
|---|---|---|
| CHARLES T. SHERWIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| DEPT. OF AIR FORCE, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

This matter is before the court on defendant's motion to dismiss, or, in the alternative, for summary judgment. The motion has been fully briefed and is now ripe for ruling.

I. Facts

Plaintiff is a former civilian employee and reservist in the United States Air Force. His status was that of an Air Reserve Technician ("ART"). As an ART, plaintiff's civilian position was tied to a parallel position in the Air Force Reserves. His civilian status was terminated on 17 June 1988. Plaintiff appealed his termination to the Merit Systems Protection Board ("MSPB") which sustained his removal. Plaintiff further appealed to the United States Court of Appeals for the Federal Circuit which affirmed the MSPB's decision.

While defendant's actions to terminate plaintiff's civilian status were in progress, a separate military administrative action was commenced by the Air Force to discharge plaintiff from the Air Force Reserves. This action resulted in a general discharge on 1 December 1989.

On 17 May 1988, plaintiff made a request pursuant to the Privacy Act, 5 U.S.C. § 552a, and Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for all documents pertaining to his military and civilian job performance as an ART. On 6 June 1988, he requested copies of all personnel maters on him, both civilian and military, including logs and information from July 1987 to June 1988. Defendant responded to these two requests by compiling all available information on plaintiff and delivering a total of 194 documents to him.

Plaintiff filed the instant suit on 16 April 1990 alleging that defendant failed to comply with the Privacy Act in maintaining the 194 documents he obtained through his requests. Document submitted in connection with the pending motion indicate that plaintiff's immediate civilian supervisor, Colonel Ronald L. Billmyer, would frequently discuss personnel matters over the telephone with plaintiff's immediate military supervisor, Lieutenant Colonel Ronald G. Sprovero. On occasion, Billmyer would ask Sprovero to memorialize their discussions regarding plaintiff for Billmyer's

personal records. In response to these requests, Sprovero would sometimes send Billmyer the private notes he had previously made regarding events involving plaintiff. Over a period of time, Sprovero sent Billmyer 17 documents he has categorized as private notes regarding plaintiff.

II. Discussion

Summary judgment is appropriate if the court is satisfied that "there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Plaintiff filed his complaint pro se and therefore it must be held to less stringent standards than formal pleading drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Nonetheless, plaintiff, in order to withstand summary judgment, must establish the existence of a genuine issue of material fact by presenting evidence on which the factfinder could reasonably find in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). "The mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient" to create a genuine issue of material fact. Id. Moreover, plaintiff's failure to create a genuine issue of material fact on any essential element of his claim will result in summary judgment being entered against him. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In reviewing the factual material submitted in connection with the motion for summary

judgment, the court has relied on only those portions of affidavits and declarations which comply with Rule 56(e).

Plaintiff's complaint is grounded almost entirely on Chapman v. National Aeronautics & Space Admin., 682 F.2d 526 (5th Cir. 1982). There plaintiff was a scientist for NASA when his employment was terminated for failure to follow administrative instructions and for otherwise unsatisfactory job performance. Id. at 527. His immediate supervisor kept extensive private notes. Eventually, his supervisor delivered these notes to a personnel management specialist at NASA. Unbeknownst to plaintiff, these notes were placed in his administrative file. Id. Soon thereafter these note played a role in plaintiff's discharge. Id. at 528-29.

The district court entered judgment against plaintiff on his claim that NASA violated the Privacy Act. The United States Court of Appeals for the Fifth Circuit reversed:

> We conclude that private notes may be made by supervisors, without violating the Privacy Act, if they are kept private. We further conclude that private notes subsequently may become part of the agency's records provided they are placed timely in those records. A timely placement would be accomplished if a supervisor's private notes are incorporated in the agency's administrative records, either physically or by inclusion of the information contained therein, at the time of the next evaluation or report on the employee's work status or performance. Otherwise, the private notes must remain private, serving only to refresh the memory of the maker, and may not be included in the agency's records.

> This rubric is designed to avoid a situation where an employee is misled and lulled into a false sense of security by being given satisfactory job performance ratings when supervisors are simultaneously and quietly collecting adverse data for later use. Such an "ambush" approach to the maintaining of records on employee job performance is not consistent with the Privacy Act.

Id. at 529.

The court observed that plaintiff's official job evaluations "did not indicate inadequate job performance, in contrast to [his supervisor's] notes which were maintained contemporaneously." Id. at 530. Consequently, the court held that the notes "should not have been used in [plaintiff's] discharge process. The use made, with the force of official administrative records, violated the Privacy Act." Id.

A review of the factual material submitted in connection with defendant's motion for summary judgment convinces the court that the 17 documents constituting private notes which Sprovero shared with Billmyer were not agency "records" within the meaning of the Privacy Act. Unlike in Chapman, plaintiff was well aware of the general content of these notes at or around the time they were shared with Billmyer. All of the information contained in these notes was information which Sprovero had already spoken to plaintiff about and/or later incorporated in documents written to him. Forty-two of 194 documents sent to plaintiff pursuant to his FOIA request

related to problems he was having at work counseled him to improve his performance. Moreover, unlike in Chapman, the essence of Sprovero's private notes was "incorporated in the agency's administrative records. . .by inclusion of the information contained therein, at the time of the next evaluation or report on the employee's work status or performance." Id. at 529. Plaintiff submitted his 12 August 1987 evaluation in support of his contention that he was "ambushed" in this discharge proceedings by the adverse private notes. The evaluation he submitted belies that contention. His overall performance rating, on a scale ranging from superior to unacceptable, was "unacceptable." He was given low-range marks in five of nine categories and central-range marks in the other four. He was not given any high-range marks. This evaluation corresponds to the information in Sprovero's private notes which he later shared with Billmyer.

Furthermore, in contrast to Chapman, only one of the 17 documents Sprovero shared with Billmyer was considered in the MSPB discharge proceedings against plaintiff and that document was made an official agency record a week prior to the MSPB hearing. It was therefore an official record before it played a part in the MSPB's adverse employment decision. Consequently, private notes played no role whatsoever in plaintiff's discharge.

Finally, it is clear from the declarations of Billmyer and Sprovero that none of the personal notes either kept, aside from the 17 Sprovero shared with Billmyer, were disclosed to any other person--they remained personal notes at all items. Such notes are proper and do run afoul of the Privacy Act. Id. at 528.

In summary, this is not a dispute over a situation where an employee was "misled and lulled into a false sense of security by being given satisfactory job performance ratings when supervisors [were] simultaneously and quietly collecting adverse data for later use." Id. at 529. Quite to the contrary, Billmyer's and Sprovero's grave concerns over plaintiff's poor job performance, which they memorialized in private notes, were made known to plaintiff repeatedly through appropriate channels including a formal job evaluation. Although plaintiff claims to have been "ambushed" by their notes like plaintiff in Chapman, the record conclusively reveals otherwise. The court concludes that there is not genuine issue of fact and that defendant is entitled to judgment as a matter of law.

## III. Conclusion

For the foregoing reasons, defendant's motion for summary judgment is hereby GRANTED. All other pending motions are hereby DISMISSED as moot. This action is hereby DISMISSED.

This 15 April 1992.

original signed

W. EARL BRITT
United States District Judge

cts/daf/sbe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 90-34-CIV-3-BR

CHARLES T. SHERWIN, )
)
Plaintiff, )
)
v. ) ORDER
)
DEPT OF AIR FORCE, )
)
Defendant. )
)

This matter is before the court on the following motions: 1) defendant's motion to dismiss, or in the alternative, for summary judgment; 2) plaintiff's motion to strike and/or disallow defendant's motion to strike and/or disallow defendant's reply to plaintiff's response to defendant's motion to dismiss; and 3) defendant's motion to strike plaintiff's response to defendant's citation of supplemental authority. These motions are all ripe for ruling.

As an initial matter, the court must decide whether 1) defendant's reply and 2) plaintiff's response to defendant's citation of supplemental authority may be considered in ruling on defendant's motion to dismiss or for summary judgment. With respect to defendant's reply, Local Rule 4.06 states that a reply must be filed

within ten days after service of the response, unless otherwise ordered by the court. No motion was filed for an extension of time.

Plaintiff's response was served on 7 August 1990. Defendant's reply was filed on 21 August 1990. Although the reply was filed 14 days after service of the response, it was timely. According to Rule 6 of the Federal Rules of Civil Procedure, Saturdays and Sundays are excluded from time computation when the period for filing is less than 11 days. Fed. R. Civ. P. 6(a). Four days between 7 and 21 August 1990 were Saturdays and Sundays. Moreover, three additional days are added if service is made by mail, as it was here. Fed. R. Civ. P. 6(e). Thus, defendant had until 24 August to file its reply, and its 21 August 1990 reply was timely. Plaintiff's motion to strike it is therefore DENIED.

With respect to defendant's motion to strike plaintiff's response to defendant's citation of supplemental authority, Local Rule 4.07 provides only for the citation of authority, not for argument or responses to the citation. Plaintiff's response was therefore improper and defendant's motion to strike it is GRANTED.

Having fully considered the briefs and other materials submitted by the parties, with the exception noted above, the court finds the existence of a genuine issue of material fact, and therefore cannot grant the defendant relief as a matter of law. The issue of fact which remains is whether the personal notes on plaintiff kept by

Lieutenant Colonel Ronald G. Sprovero became "records" of the Department of the Air Force, within the meaning of 5 U.S.C. § 552a(a) (4), prior to plaintiff's termination. See Chapman v. Nat'l Aeron. & Space Admin., 682 F.2d 526 (1982), cert. denied, 469 U.S. 1038 (1984). Defendant's motion to dismiss, or in the alternative, for summary judgment, is therefore DENIED.

This 23 November 1990.

original signed

W. EARL BRITT
United States District Judge

cts/daf/sbe

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

**No. 92-1678**

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CHARLES T. SHERWIN,

Plaintiff - Appellant,

versus

UNITED STATES AIR FORCE,

Defendant - Appellee,

and

RONALD G. SPROVERO; RONALD L. BILLMYER; A.D. TALLEY; B.R. HENDERSON; CELIA SMITH; LAVERNE HARPER; M.R. PETERS; ROBERT CUTRELL; ROBERT STROEBEL; DONALD ROBINSON; JEFF OSBORNE; BRAD ADAMS; WILLIAM WALLER; R.S. BURRUS,

Defendants.

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Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. W. Earl Britt, District Judge., (CA-90-34-3-CIV-BR)

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APPENDIX C

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Submitted: September 20, 1993 Decided: October 11, 1994

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Before WIDENER, HALL, and HAMILTON, Circuit Judges -

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Affirmed by unpublished per curiam opinion.

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Charles T. Sherwin, Appellant Pro Se. Eileen Coffey Moore, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Charles T. Sherwin appeals from the district court's order granting summary judgment to Defendant on his complaint alleging a violation of the Privacy Act, 5 U.S.C.A. § 552a (West 1977 & Supp. 1993). Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Sherwin v. United States Air Force, No. CA-90-34-3-CIV-BR (E.D.N.C. Apr. 15, 1992). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 92-1678

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|---|---|
| CHARLES T. SHERWIN,<br><br>Plaintiff - Appellant,<br><br>-vs-<br><br>UNITED STATES AIR FORCE,<br><br>Defendant - Appellee,<br><br>and<br><br>Ronald G. Sprovero, et als.,<br><br>Defendants. | PETITION FOR REHEARING and SUGGESTION FOR REHEARING IN BANC (FRAP'S 40 and 35) |

Charles T Sherwin, appearing pro-se, herewith Petitions this Court for Rehearing; Suggestion for Rehearing In Banc, based on the following:

1. A material fact or law overlooked in the decision: Plaintiff appealed form the district court's order granting Summary Judgment to the Defendant after a "genuine issue of a material fact" was determined to exist in this case -- See, ORDER of Court signed by United States District Court Judge W. Earl Britt dated November 23,

1990, FILED November 26, 1990, finding: "Having fully considered the briefs and other materials submitted by the parties, with the exceptions noted above, the court finds the existence of a genuine issue of material fact, and therefore cannot grant the defendant relief as a matter of law. The issue of fact which remains is whether the personal notes on plaintiff kept by Lieutenant Colonel Ronald G. Sprovero became 'records' of the Department of the Air Force, within the meaning of 5 U.S.C. (Section) 552a(a)(4), prior to plaintiff's termination. See Chapman v. Nat'l Aeron. & Space Admin., 682 F.2d 526 (1982), cert denied, 469 U.S. 1038 (1984). Defendant's motion to dismiss, or in the alternative, for summary judgment, is therefore DENIED," which is in the Record of Proceedings at Item 33, Docket as of July 28, 1992, submitted to this Court as a "true and correct copy of the original" by the Clerk, United States District Court for the Eastern District of North Carolina, by Teri Carpenter, Deputy Clerk. Clearly, Summary Judgment could not have been granted to the Air Force, when there exists a "genuine issue of a material fact," as is the "fact" in this case. There has never been any trial on the merits of this case; there has never been any hearing before any "finder-of-fact" in this case on the "merits" of this case -- the District Court has erred by a granting of Summary Judgment to the (defendant) after a "finding" of a "genuine issue of a material fact," without a trial on the merits. The District Court has allowed

this case to be tried by Motions, which is contrary to law. Summary Judgment can only be granted when there is no "genuine issue(s) of material fact," which is clearly, not so in this case. See, Pierce v. Ford Motor Co., 190 F2d. 910, 915 (4th Cir.), cert. denied, 342 U.S. 887, 72 S. Ct. 178, 96 L.Ed. 666 (1951). Clearly, once a "genuine issue of a material fact" is "found," the case may not be "tried" by Motions, as was the case. There never having been a trial - after "finding(s)" of District Court Judge W. Earl Britt in his order signed November 23, 1990, filed November 26, 1990 of a "genuine issue of (a) material fact" - when this matter was, clearly, improperly resolved without a "trial on the merits," but by "motion practice," this case should be remanded to the district court for reconsideration of summary judgment and trial if necessary, with guidance. "The burden is on defendant, as the moving party, to demonstrate the absence of any genuine issue of material fact." Adickes v. S.H. Kress & Co., 398 U.S., 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Plaintiff steadfastly maintains that the "facts" as were determined by the District Court in (its) granting of Summary Judgment to the defendant - after multiple Motions having been filed over the same issues and facts by the defendant's attorney even after the "finding" and "ruling" of the existence of (a) "genuine issue of a material fact" by Order filed November 26, 1990 - is contrary to law, and cannot

stand, and this case should be remanded to the district court for a trial.

This Court's Opinion dated October 11, 1994, stating: "Our review of the record and the district court's opinion discloses that (this) appeal is without merit. Accordingly, we affirm on the reasoning of the district court," cannot be factual. The District Court granted summary judgment to the defendant after "finding" a genuine issue of a material fact," as is outlined above. Therefore, the district court has erred by granting summary judgment, and its opinion is contrary to law, and cannot stand. Summary Judgment can only be granted in the absence of any "genuine issue of a material fact." Once a "genuine issue of a material fact" is determined to be in existence, there would have to be a trial in order to resolve the dispute, which is not the case between plaintiff and the defendant: this case has never had any trial or any hearing to resolve the "disputed genuine issue of a material fact" as was "found" by the district court in its Order filed November 26, 1990. This case was never heard before any "finder-of-fact," but, instead, was resolved by many, many Motions filed by the defendant's attorney over the same "issues-and-facts," who changed testimony and altered evidence before the district court in order to gain a favorable ruling and gain a grant of "summary judgment" when there exists a "genuine issue of a material fact," as has been determined by District Court Judge W. Earl Britt in his

Order dated November 23, 1990, filed November 26, 1990 -- a "ruling" that would preclude any grant of Summary Judgment to either party in this case.

Accordingly, this appeals court cannot AFFIRM on the reasoning of the district court, Sherwin v. United States Air Force, No. CA-90-34-3-CIV-BR (E.D.N.C. April 15, 1992), as is outlined in the per curium AFFIRMED Opinion of October 11, 1994. Since the district court has erred by its ruling, this appellate court cannot affirm an erroneous ruling. It is contrary to law.

2. The Opinion is in conflict with another decision of the Court: This pro se litigant has cited several cases where it is more-than-clear that the granting of summary judgment by the district court when there exists a "genuine issue of a material fact" that has not been properly "tried" or "resolved" or "adjudicated' but, instead, has been allowed to be adjudicated by motion practice - motions that are presented over the same "facts and issues" and with conflicting evidence and testimony, and in fact are "clearly erroneous and contrary to law" and still "disputed" without a "trial on the merits" before a "finder-of-fact" - clearly warrants a Rehearing, and this pro-se litigant respectfully suggests a Rehearing in Banc.

Also, there is conflict with another court of appeals in this Opinion filed October 11, 1994. The 5th Circuit Court of Appeals has determined in its ruling that: "We conclude that private notes

may be made by supervisors, without violating the Privacy Act, if they are kept private." By AFFIRMING the court's order granting summary judgment to the (Air Force) in this instant case, the court has condoned the "joint authorship" of "personal notes," when it has AFFIRMED granting of summary judgment to the defendant when it is more than clear: Sprovero and Billmyer "shared" Sprovero's "personal notes" almost from the get-go on the record. See, Page 5 of the AFFIRMED Order of the District Court granting Summary Judgment to the defendant, April 15,1992: "A review of the factual material submitted in connection with defendant's motion for summary judgment convinces the court that the 17 documents constituting private notes which Sprovero shared with Billmyer," cannot be AFFIRMED by this Court AFTER the forgoing; clearly, for a note - or anything for that matter - to be "personal," it or the note could not be "shared" at all. There were not a lot more than just "17" of the allegedly "personal notes" that were "shared" in this case. This and other "disputed issues" have been presented to this appellate court in the informal briefs and other submissions to this court, and are in the Record of Proceedings of the District court. Therefore, the statement: "We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the court and argument would not aid the decisional (sic) process," cannot be true. This pro-se litigant will hire an attorney, Mr. Phillip

W. Barton, to argue before this honorable court, to adequately present all the facts and legal contentions and materials before this court. This pro-se litigant would not attempt to do-so without adequate, trained representation. Since there has never been a trial on the merits of this case, nor has there been any hearing on the merits of this case, but the case was "tried" through motion practice - even after the finding of a "genuine issue of a material fact" on November 23, 1990, Order filed in the U. S. District Court on November 26, 1990, by U.S. District Judge W. Earl Britt, and the granting of a "summary Judgment" while there still exists a "genuine issue of a material fact" which cannot be resolved by Motion Practice by the same judge, no less, who "found" the "genuine issue of a material fact," this appellate court should schedule Oral Argument in this complex case, and this litigant will retain an attorney, to protect (his) due-process of law rights before this court -- and if necessary before the U.S. District Court and/or the Supreme Court.

Based on the forgoing, this appellant prays this court to consider this Petition for Rehearing and Suggestion for Rehearing In Banc in accordance with Federal Rules of Appellate Procedure 40 and 35, respectively; that his honorable court GRANT these petitions, and allow this case to proceed to its rightful and lawful outcome so that justice may prevail.

Respectfully submitted, this 18 day of October, 1994.

original signed

CHARLES T. SHERWIN, APPELLANT
6440 East Hampton Road
Fayetteville, North Carolina 28314
(910) 487-0625

CERTIFICATE OF SERVICE

I certify that I served a copy of the forgoing upon the below list defendant's attorney by placing same in the U.S. Mail, postage pre-paid, first-class, addressed to:

Eileen Coffey-Moore
AUSA
Room 800, Federal Bldg.
310 New Bern Avenue
Raleigh, NC 27602

original signed

CHARLES T. SHERWIN

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 8, 1994

No. 92-1678
CA-90-34-3-CIV-BR

CHARLES T. SHERWIN

Plaintiff - Appellant

v.

UNITED STATES AIR FORCE

Defendant - Appellee

and

RONALD G. SPROVERO; RONALD L. BILLMYER; A.D. TALLEY; B.R. HENDERSON; CELIA SMITH; LAVERNE HARPER; M.R. PETERS; ROBERT CUTRELL; ROBERT STROEBEL; DONALD ROBINSON; JEFF OSBORNE; BRAD ADAMS; WILLIAM WALLER; R.S. BURRUS

Defendants

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On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this

Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 15, 1994

No. 92-1678
CA-90-34-3-CIV-BR

Sherwin v. US Air Force

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M A N D A T E

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The judgment of this Court dated 10/11/94 takes effect today.

BERT M. MONTAGUE
CLERK

APPENDIX F

SUPREME COURT OF THE UNITED STATES
1 First Street, N.E., Washington, D.C. 20543

Docket No. _____

| | | |
|---|---|---|
| CHARLES T. SHERWIN, | ) | |
| | ) | |
| Petitioner - Appellant, | ) | |
| | ) | |
| -vs- | ) | APPLICATION FOR |
| | ) | AN EXTENSION OF |
| UNITED STATES AIR FORCE, | ) | TIME |
| | ) | |
| Respondent - Appellee. | ) | |
| | ) | |

PURPOSE

The purpose of this Motion is to extend the time to file a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, which has Affirmed by unpublished per curiam opinion an Appeal from the United States District Court for the Eastern District of North Carolina, Docket No. 92-1678 (CA-90-34-3-CIV-BR), decided October 11, 1994; Order denying the timely filed Petition for Rehearing and Suggestion for Rehearing In Banc filed on November 8, 1994. (Rule 21)

FACTS ON WHICH BASED

Petitioner - Appellant is pro se in this action, and wishes an extension of time based on the following:

1. Petitioner Appellant has filed a Motion to the District Court which dismissed this action and granted summary

judgment to the (Air Force) erroneously -- the motion is pursuant to Federal Rule of Civil Procedure 60 (b) because the District Court granted summary judgment and dismissal when there existed a "genuine issue of a material fact" found earlier by the same "finder-of-fact" who granted the summary judgment and dismissal. That was - and is- "error" on the part of the presiding judge. Summary Judgment may only be granted to the moving party when there is no "genuine issue" for a trial -- once a "genuine issue of a material fact" is found to exist, the case would have to proceed to a trial and summary judgment cannot be granted to either party; the "merits of the case" cannot be resolved by summary ruling. (Rule 56, Federal Rules of Civil Procedure). Petitioner - Appellant has asked the District Court to reconsider its granting of Summary Judgment, Dismissal, in favor of the "moving party," and expects the District Court to render a ruling shortly -- after the proper twenty-day period allotted by the rules of Practice and Procedure for the Easter District of North Carolina. In fact, the district court's granting of Petitioner - Appellant's Motion made pursuant to Federal Rule of Civil Procedure 60 (b) may preclude having to file a Petition for a Writ of Certiorari if the district court grants (that) Motion.

2. Petitioner - Appellant does not have the necessary three-hundred dollar ($300.00) docketing fee required by this Court as of yet. Petitioner - Appellant is, however, expecting to receive his

W-2 forms from his employer by the 1st day of February, and will file (his) Income Tax Return(s), and is expecting enough of a refund to pay the docketing fee in this Court. Petitioner - Appellant is employed and cannot file "In Forma Pauperis," but will have the filing fees upon receipt of (his) Tax Refund(s).

## CONCLUSION

Based on the foregoing reasons, Petitioner - Appellant asks this Supreme Court to extend the time to file (his) Petition for a Writ of Certiorari from February 8, 1995, to April 10, 1995, for good cause having been shown; and asks this court's indulgence if any of this pro se submission may not be in accordance with the normal submissions made by a trained attorney -- Petitioner - Appellant tries very hard to interpret the rules, and sometimes fails.

This 23 day of January, 1995.

original signed

CHARLES T. SHERWIN
6440 East Hampton Road
Fayetteville, North Carolina 28314
Tel: (910) 487-0625

*Supreme Court of the United States*

No.

A-549

Charles Sherwin,

Petitioner

v.

United States

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ORDER

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UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

March 8th, 1995

/s/ William H. Rehnquist

Chief Justice of the United States

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 90-34-CIV-3-BR

| | | |
|---|---|---|
| CHARLES T. SHERWIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| UNITED STATES DEPARTMENT OF THE AIR FORCE, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

On 15 April 1992, this action was dismissed on motion by defendant for summary judgment. On 11 October 1994, that decision was affirmed by the United States Court of Appeals for the Fourth Circuit. On 3 January 1995, plaintiff filed the present motion for relief from judgment, purportedly pursuant to F.R.C.P. 60(b)(6). The court is without jurisdiction to entertain this motion and the same is therefore DENIED.

This 8 February 1995.

original signed

W. EARL BRITT
United States District Judge

APPENDIX I